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**IN THE UNITED STATES DISTRICT COURT**  
**DISTRICT OF UTAH, CENTRAL DIVISION**

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AARON JAMES and TIFFANY JAMES,  
Heirs and Personal Representatives of the Estate  
of Zane James and in their individual capacities;

Plaintiffs,

vs.

CASEY DAVIES, and CITY OF  
COTTONWOOD HEIGHTS,

Defendants.

**PLAINTIFFS' OPPOSITION TO  
DEFENDANT CASEY DAVIES' SHORT  
FORM DISCOVERY MOTION –  
MOTION TO STAY DISCOVERY**

Case No. 2:19-cv-00341

Judge Howard C. Nielson, Jr.  
Magistrate Judge Dustin B. Pead

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**BACKGROUND**

Defendants answered the Amended Complaint on September 20, 2021.<sup>1</sup> Neither Defendant filed a motion to dismiss. The parties held a discovery conference in which they agreed on a schedule for written discovery and depositions. The court entered a scheduling order allowing written discovery and depositions.<sup>2</sup> The parties then proceeded with written discovery.

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<sup>1</sup> (Dkt. 101)

<sup>2</sup> (Dkt. 106)

Plaintiff has issued several discovery requests and Cottonwood Heights has responded and has produced thousands of documents. The discovery process so far has been highly effective in finding additional evidence in support of Plaintiffs' claims. On December 7, 2021, the court granted Plaintiffs' motion to strike Defendants' answers for failure to comply with Rule 8 and ordered Defendants to answer the complaint in compliance with the rules.<sup>3</sup>

### **ARGUMENT**

Davies' motion should be denied for three reasons:

First, Davies' motion to dismiss is in violation of the court's order of December 7, 2021. The court ordered Defendants to file a "Second Amended Answer." The court did not grant leave to Defendants, who had already answered, to file a Rule 12(b)(6) motion to dismiss.

Second, the motion is procedurally defective. Federal Rule of Civil Procedure 12(b) requires that a motion asserting the defense of failure to state a claim "*must be made before pleading....*" "If the defendant decides to assert a Rule 12(b) defense by motion, then he must do so before filing the answer."<sup>4</sup> Therefore Davies' motion to dismiss is improper and cannot be the basis to halt discovery.

Third, the cases Davies cites are inapplicable. Davies' motion has shown one thing only: parties that raise proper procedural defenses *via timely motion* are entitled to a stay of discovery. Thus, courts have stayed discovery where there is a pending timely motion to dismiss or a pending motion for summary judgment.<sup>5</sup> These cases are inapplicable here because Davies has

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<sup>3</sup> (Dkt. 112)

<sup>4</sup> Wright and Miller, 5C Fed. Prac. & Proc. Civ. §1361.

<sup>5</sup> *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (immunity issue determined at summary judgment stage); *Workman v. Jordan*, 958 F.2d 332, 334 (10th Cir. 1992) (timely filed Rule 12(b)(6) motion to dismiss); *Taylor v. Grisham*, 2020 WL 6489643, \*1-2 (\*D.N.M.) (summary

answered the complaint and the parties are already headlong down the discovery track. Having answered the complaint and started discovery, and having seen the onslaught of bad facts headed their way, Plaintiffs should not be allowed to pull back the curtain to prevent inquiry and go back in time to September 2021 when they determined the complaint stated a claim for relief under applicable qualified immunity law and decided to answer.

### **CONCLUSION**

Davies' motion to stay discovery should be denied. Plaintiffs should be allowed to depose the parties and eyewitnesses to the shooting.

Plaintiffs request oral argument.

DATED: February 16, 2022

/s/ Sam Meziani  
Sam Meziani  
*Attorney for Plaintiffs*

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judgment stage); *Tennant v. Miller*, 2013 WL 4848836, \*1 (D. Kan.) (“**Here, discovery has not commenced and a [Rule 16] scheduling conference has not been held**”); *Rancho del Oso Pardo v. New Mexico*, 2020 WL 3606755 (D.N.M.) (timely filed Rule 12(b)(6) motion); *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009) (qualified immunity raised in timely filed Rule 12(b)(6) motion).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 16th day of February, 2022, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following:

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